

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA 08-912

CARMEN VAUGHAN

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES and MINOR
CHILDREN

APPELLEES

Opinion Delivered JANUARY 28, 2009

APPEAL FROM THE UNION
COUNTY CIRCUIT COURT,
[NO. JV 2008-21; JV 2008-22]

HONORABLE EDWIN KEATON,
JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

By two separate orders entered May 21, 2008, the Union County Circuit Court adjudicated Z.G.B. (born February 7, 1997), J.B. (born January 19, 2003), B.V. (born June 30, 2004), and C.V. (born December 11, 2005) dependent-neglected. Appellant Carmen Vaughan, stepmother to B.V. and mother to C.V., Z.G.B., and J.B., appeals from the two orders.¹ First, she challenges the finding that she committed abuse or neglect against B.V., calling into question the credibility of the witnesses who testified against her. Second, she asserts that there was no evidence presented to support that C.V., Z.G.B., or J.B. were dependent-neglected. Finally, she argues that the circuit court erred in denying a continuance to obtain the testimony of the person who performed a psychological

¹An adjudication order is a final, appealable order under Arkansas Rule of Appellate Procedure—Civil 2(c)(3)(A) and Arkansas Supreme Court Rule 6-9(a)(1)(A).

examination of her. We affirm.

Factual and Procedural History

B.V. is the daughter of Stephen Vaughan and Kimberly Vaughan, who passed away days after B.V.'s birth. Stephen married appellant in March 2005, and C.V. was born of that marriage later that year. Z.G.B. and J.B. are appellant's sons from a previous relationship. On December 20, 2007, an investigator for the Arkansas Department of Human Services (DHS) visited the family after receiving a report from the Child Abuse Hotline. Appellant and Stephen denied the allegations and claimed that Kimberly's relatives were blackmailing them. On January 8, 2008, appellant was arrested and charged with second-degree battery for physically abusing B.V. DHS exercised a seventy-two-hour hold on all of the children on that day. The circuit court entered an emergency order of custody the following day, and found probable cause to exercise the hold on January 11, 2008. The adjudication hearing began on March 27-28, 2008, and concluded on April 25, 2008.

Kay Vaughan, Stephen's mother, testified about the family's background. She stated that Stephen was devastated when Kimberly died. Within a week of Kimberly's death, Stephen and B.V. moved to El Dorado to live with Kay. Stephen and B.V. returned to Little Rock in March 2005 when he married appellant. Because Z.G.B. and J.B. were still in school in El Dorado, appellant waited until May 2005 to move to Little Rock. Kay visited B.V. on May 19, 2005. B.V. appeared lethargic and looked sad. This was unusual, according to Kay, because B.V. was usually a happy child. The following June, appellant and Stephen separated, and the two did not talk until after C.V. was born. At that time, it appeared that

appellant and Stephen would not reconcile, and Kay and her husband moved to Little Rock to be closer to Stephen and B.V. Stephen and B.V. returned to El Dorado in September 2006, and Kay and her husband followed in November 2006. In 2007, Kay was concerned that she was seeing B.V. less and less. She did not get to visit her grandchildren from May 2007 until December 15, 2007, when the allegations of abuse surfaced. Kay observed that appellant would treat B.V. differently from the other children. For example, appellant would purchase a gift for C.V. without buying one for B.V. She would also tell C.V. that she loved him, but not say anything to B.V. Kay also recalled an incident at a DHS staffing held March 5, 2008. B.V. mentioned that she looked like her mother Kimberly, to which appellant replied in a hateful voice, “Your momma was a goof ball.”

Next, the court heard testimony from Kimberly’s sisters, Candy Guinn and Cherie Wedgeworth. Guinn stated that she was able to bring B.V. to her home about once a month from the end of 2006 through the end of 2007. According to Guinn, B.V. was a happy child when she was with her, but B.V. would cry when Guinn tried to take her home. On August 24, 2007, Guinn and Wedgeworth observed bruises on B.V. Photographs introduced into evidence showed bruising on various parts of B.V.’s body, including her left ear, over her left eyebrow, on her left arm, and on her buttocks. Guinn testified that she did not confront appellant and Stephen at that time, as she did not trust them. Guinn and Wedgeworth photographed more bruises on September 14 and December 1, 2007.

The first time Guinn discussed the injuries was on December 1, 2007, when Stephen came to her. Early that morning, Stephen called her and asked her to pick up B.V. She

arrived at that residence and saw B.V. wrapped in a blanket. Stephen was intoxicated. He stated that he was going to be right behind, but Guinn convinced him to ride with her instead. During the ride, Stephen cried and apologized for being a bad father. He also told Guinn that appellant hated B.V. and left bruises on her. Stephen planned to move in with Guinn, but he changed his mind the next day after talking to appellant. The following Tuesday, Guinn called Stephen and expressed her concern about B.V. being in their home. Guinn also talked to appellant, but appellant denied any wrongdoing other than calling B.V. a “bitch.” The next day, Guinn filed a formal complaint with the police department.

Jennifer Creager and Jessica Smith were appellant’s classmates in nursing school. Both stated that, while appellant would have positive interaction with her other children, appellant hated B.V. and called her names. Both also testified about an incident that occurred while they were studying at appellant’s home. Z.G.B. asked Creager and Smith if they wanted to know where B.V. slept. He then took the two of them to the bathroom/laundry room, where they saw a daybed. The room was at the opposite end of the residence from the other bedrooms, giving the appearance that B.V. was separated from the rest of the family. The bed was positioned in such a way that made it difficult for a three-year-old to get in or out, and it placed a young child at risk of hitting her head on the sink. Z.G.B. laughed upon showing B.V.’s bed to Creager and Smith. Later during the hearing, Stephen admitted that it was he who moved B.V.’s bed into the bathroom/laundry room, though it was a temporary arrangement.

Smith also testified about appellant’s prescription drug use. She stated that appellant

used Adipex, an amphetamine typically used for weight loss. Appellant told Smith that she had a prescription for the drug prior to her starting nursing school, but that she (appellant) had no prescription while they were in school. Smith admitted giving appellant some of her left over Adipex while they were in school and testified that appellant would take the drugs to improve her mood.

Kelsi Graves, another of appellant's nursing-school classmates, testified that she babysat the children from September 2006 through August 2007. She stated that she stopped babysitting because she disagreed with how appellant was treating B.V. She recalled that she was often instructed to refill C.V.'s bottle of milk if necessary, but that she was not to give B.V. any food or water. On those occasions, appellant would explain that B.V. was being sent to bed for acting up and that she (appellant) did not want to deal with B.V. Appellant would also instruct Graves that she could go to C.V. if he cried out, but that she was to leave B.V. alone if she cried. Graves once saw appellant spank B.V. with a glue stick, and she stated that appellant used a glue stick because it supposedly did not leave bruises. She testified about the derogatory names appellant would call B.V., and she specifically recalled appellant saying, "Why would God take away my baby girl but give me a girl that's retarded that can't do anything?"

After negotiations with the prosecutor's office, Stephen testified at the hearing.² He

²The record contains a letter from the prosecutor's office, indicating that charges against Stephen would possibly be dropped in exchange for truthful testimony in the dependency-neglect case and that any testimony in the dependency-neglect case would not be used against him in any criminal matter.

recalled the series of events that occurred on November 30 and December 1, 2006, to which Guinn previously testified. That evening, appellant had put B.V. in timeout and forced her to stand in the corner without any clothing. While she was standing in the corner, Z.G.B. kicked B.V. in the buttocks. Later that evening, B.V. was attempting to climb into her bed; appellant put her foot on B.V.'s back and shoved her into bed. Stephen became upset and started drinking heavily. While intoxicated, Stephen tried to settle down by going into their yard and raking leaves. When appellant yelled at him, he decided to set a fire in the backyard and burn junk in the garage. Appellant called the police. Stephen left the house, but he returned later and stated that he was leaving. By that point, he had called Guinn, who was on her way to pick up B.V. When he left with Guinn, he told her that appellant hated B.V. Stephen opined that, while appellant treated the other children well, the other children were exposed to appellant's hatred toward B.V. The next day, Stephen talked to appellant, who was apologetic and remorseful. Stephen testified that, given his history with appellant, he was afraid that he would never see C.V. again if he left her. He was also concerned that appellant would speak negatively about him in front of the children.

Stephen described an exhibit that he created in February 2008, which documented appellant's abuse of B.V. He wrote that in May 2007, he took B.V. out of daycare for a week because there were bruises on her legs from a spanking by appellant. This was the first time he recalled seeing bruises on B.V. During this time, appellant would pick B.V. up from daycare and have her in bed by 5:00 p.m. Appellant would often call Stephen and tell him that she "put that bitch to bed." Stephen stated that appellant would abuse B.V. in the

bathroom by slamming her back against the toilet and throwing her into the bathtub. In a separate incident that occurred in 2007, appellant called Stephen to the bathroom while B.V. was on the toilet. She then pulled B.V. forward, straddled B.V.'s neck between her legs, wiped B.V.'s bottom, and moved causing B.V. to fall onto the floor. In late 2007, appellant started saying that she would kill B.V. if she knew she could get away with it.

Stephen recalled moving B.V.'s bed into the bathroom/laundry room. He testified that he did so to keep appellant away from her. He stated that appellant would wake B.V. up in the middle of the night and yell at her, claiming that she was not asleep. He also recalled occasions where he was attempting to move B.V. from his bed to B.V.'s bed. Appellant would wake B.V. up from a "dead sleep" and force her to walk to her own bed. During this time, according to Stephen, appellant was abusing amphetamines, which affected her mood. He did not know whether appellant took the pills as prescribed, but he stated that the pills put her in a bad mood. Despite all of this, Stephen stated that appellant was a good mother to the other children, though J.B. had been exhibiting anger problems within the previous year.

On April 25, 2008, the final day of the adjudication hearing, appellant asked the court to consider a psychological evaluation performed on her. Other parties objected to the consideration of the evaluation for the purposes of adjudication. At the conclusion of the hearing, all of the attorneys gave their opinions as to the relevance of the psychological evaluation. Appellant's counsel argued that the evaluation was relevant toward the finding of whether the three boys were dependent-neglected, given that there was no evidence of

any abuse directly against them. Appellant proffered the psychological evaluation into evidence, but the court ultimately concluded that it was not relevant for determining whether the children were dependent-neglected.

Also on April 25, 2008, appellant presented the testimony of Carol Kaplan and Sue Bohnen.³ While not licensed, Kaplan ran a daycare center and occasionally took care of the children. She testified that she saw nothing wrong about the children or appellant's care for them. Bohnen, appellant's mother, also thought appellant was appropriate around B.V. Bohnen testified that appellant never used vulgar language in describing B.V. Upon further questioning, she testified that she did not consider "bitch" to be vulgar language.

At the conclusion of the hearing, the court adjudicated all of the children dependent-neglected. It found both of appellant's witnesses not credible and opined that Bohnen's testimony was more consistent with helping appellant rather than giving the facts. It found B.V. to be dependent-neglected based upon the abuse inflicted upon her, and it found the other three children to be dependent-neglected based upon the fact that the abuse occurred in their presence and that at least one of the children had begun to act inappropriately. The court entered two separate adjudication orders (one for B.V. and one for C.V., Z.G.B., and J.B.) on May 21, 2008. In the orders, the court stated that appellant's abuse of B.V. was "measured, studied, continual, and deliberate," that appellant "went out of her way to be mean spirited to [B.V.]," and that much of the abuse occurred in the presence of the other

³Given the circuit court's finding that these witnesses were not credible and our standard of review, which requires deference to that credibility finding, we have chosen not to detail the substance of their testimony.

children. B.V. was placed in the custody of Kay and Michael Vaughan, and the case involving her was closed. C.V. was also placed in the Vaughans' custody, while Z.G.B. and J.B. were placed with other relatives. That case remained open.

Dependency-Neglect Adjudications

Appellant presents separate arguments regarding the adjudications of B.V. and of C.V., Z.G.B., and J.B. Regarding B.V., she asserts that, given the motives of the witnesses who testified against her, the evidence presented at trial was insufficient to find that she abused or neglected B.V. With respect to the other children, she argues that there was no evidence that the children are currently at a risk of harm.

The definition of “dependent-neglected juvenile” includes any juvenile who is at substantial risk of serious harm as a result of abuse, neglect, or parental unfitness to the juvenile, a sibling, or another juvenile. *See* Ark. Code Ann. § 9-27-303(18)(A)(ii), (v), (vi) (Repl. 2008). The juvenile code requires proof by a preponderance of the evidence in dependency-neglect proceedings. *See* Ark. Code Ann. § 9-27-325(h)(2)(B) (Repl. 2008). We review dependency-neglect cases de novo, but we do not reverse the circuit court’s findings unless they are clearly erroneous or clearly against the preponderance of the evidence. *Moiser v. Ark. Dep’t of Human Servs.*, 95 Ark. App. 32, 233 S.W.3d 172 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Id.* In resolving the clearly erroneous question, we give due regard to the circuit court’s opportunity to judge the credibility of witnesses. *Ark. Dep’t of Health & Human Servs. v.*

Mitchell, 100 Ark. App. 45, 263 S.W.3d 574 (2007).

Appellant challenges the finding that she abused or neglected B.V. In so arguing, she asserts that Guinn and Wedgeworth had an ulterior motive when testifying to the allegations, that Vaughan's testimony was worthless because said testimony was in exchange for getting criminal charges against him dropped, and that her former nursing colleagues did not see any actual abuse.⁴

Appellant's argument is merely an attack on the credibility of DHS's witnesses. As we stated in *Albright v. Ark. Dep't of Human Servs.*, 97 Ark. App. 277, 284, 248 S.W.3d 498, 503 (2007) (citations and internal quotes omitted): "Our standard of review requires deference to the circuit court's determinations of credibility. To find any merit in appellant's contentions, this court would have to act as a super factfinder, substituting its own judgment or second guessing the credibility determinations of the court." The testimony from DHS witnesses included appellant referring to the child as a "bitch"; stating that she never liked the child and would kill her if she could get away with it; physically abusing the child on multiple occasions; allowing her husband to move B.V.'s bed to the bathroom, where she could have hit her head on the sink; and humiliating B.V. in front of her other children. Though appellant presented witnesses who were not concerned about how appellant treated B.V., the circuit court found those witnesses to be not credible. In short, the circuit court did not err in finding that appellant subjected B.V. to abuse and neglect.

⁴Appellant also noted that, as a hospital nurse, Guinn was a mandatory reporter. Guinn admitted that she did not report the abuse, but that she thought that her obligation to report abuse was applicable only while she was on the job.

Appellant separately challenges the finding that her sons, C.V., Z.G.B., and J.B., were dependent-neglected. She contends the circuit court erred by finding her sons dependent-neglected based on the finding that B.V. was dependent-neglected. The attorney ad litem for Z.G.B. and J.B. joins appellant in this argument, asserting that the record is devoid of evidence that any of appellant's actions brought harm to either of those two children.

Much of appellant's argument is devoted to her contention that a child cannot be adjudicated dependent-neglected solely based on the abuse of another child. However, the circuit court's ruling from the bench reflects that C.V., Z.G.B., and J.B. were adjudicated dependent-neglected, not automatically as a result of the abuse against B.V., but because said abuse was occurring in the presence of the children and because of the effect of seeing said abuse.⁵ Even so, we have held children to be dependent-neglected even though the abuse

⁵The circuit court specifically found:

[B.V.] is dependent neglected. I also find as to the other three, as well. The evidence was at that last hearing, I believe it was the older child had started to act out and engage in conduct. And this conduct is starting, just be out of the blue.

And certainly the evidence was much of this is almost hatefulness toward this little girl, mean-spirited behavior toward a little child. Took place right in the presence of her own children, of these boys. They saw it.

I remember one of the nurses testifying, nurses-to-be, maybe they're nurses now, testifying about how [Z.G.B.] called their attention to [B.V.]'s new bedroom and wanted them to see it and it was funny to him. He was tickled. I mean, that's kind of consistent with some of the belittling, some of the faces, the mocking of the child that the evidence shows that Carmen Vaughan did by some of these nurse witness. I think the babysitter, they referred to how she would mock the child, make faces and her kids would be in and about and right around. Abusive behavior. Mean-spirited behavior.

Referring to her as a bitch. Each of those nurses, and I recall, were asked about was she saying, "she was acting like a bitch." And each one said, "There were times she said that but she said that little bitch," or, "I can't stand that bitch," words like that. It was more than "she acts like a bitch."

So the Court is finding that to engage in abusive, mean-spirited behavior to a

justifying the adjudication was perpetrated upon a sibling.

In *Brewer v. Arkansas Department of Human Services*, 71 Ark. App. 364, 43 S.W.3d 196 (2001), DHS filed a petition for dependency-neglect one day after the infant's birth, alleging that the parents' other child had been adjudicated dependent-neglected as a result of extreme abuse perpetrated by one of the parents. The parents argued that the trial court erred in finding the infant dependant-neglected solely based upon the abuse of the sibling. We disagreed:

We do not reach appellant's argument that ADHS failed to establish any abuse to [the child]. Section 9-27-303(15)(a) explicitly states that a dependent-neglected child is one at risk of serious harm from an unfit parent. Parental unfitness is not necessarily predicated upon the parent's causing some direct injury to the child in question. Such a construction of the law would fly in the face of the General Assembly's expressed purpose of protecting dependent-neglected children and making those children's health and safety the juvenile code's paramount concern. To require [the child] to suffer the same fate as his older sister before obtaining the protection of the state would be tragic and cruel.

Brewer, 71 Ark. App. at 368, 43 Ark. App. at 199 (2001).

We cited *Brewer* favorably in *Arkansas Department of Human Services v. McDonald*, 80 Ark. App. 104, 91 S.W.3d 536 (2002). There, DHS presented evidence that the father spanked one of his children five times with a spoon, then poured salt in the child's wounds and forced the child to stay at home for two days. The father conceded that the child he spanked was dependent-neglected, but argued that his two other children were not. The circuit court agreed with the father and found that DHS failed to prove that the other

small child in the presence of your children, and as a result of that conduct, at least one of those children started to react inappropriately, the Court finds all of those children dependent neglected.

children were dependent-neglected. We disagreed and reversed the circuit court's decision.

In contrast to the above cases, appellant cites *Arkansas Department of Health & Human Services v. Mitchell*, 100 Ark. App. 45, 263 S.W.3d 574 (2007), for the proposition, "The mere presence of someone who may have committed abuse on someone else does not lead inexorably to the conclusion that others are at risk." In *Mitchell*, DHS sought to have the appellees' children adjudicated dependent-neglected based on the father pleading guilty to sexual offenses involving some of his seventeen-year-old male students. We rejected DHS's argument that the children were, as a matter of law, at substantial risk of harm simply because the mother left the children in the care of the father.

We find *Brewer* and *McDonald* to be more persuasive than *Mitchell*. Under those two cases, we held that the State needed not wait until a child is in imminent danger of harm before intervening and offering protection. *Cf. Ark. Dep't of Human Servs. v. Bixler*, 364 Ark. 292, 219 S.W.3d 125 (2005) (holding that parents placed their children in danger when they allowed the children to spend the night unsupervised with the children's step-grandfather, whom the parents knew to be a convicted sex offender). While appellant has been loving to her other children, we cannot say that those children have not been affected by her abuse of B.V. We particularly cannot so hold due to evidence that one child, Z.G.B., appeared to take the abuse as a proper example of how to behave. Between the abuse perpetrated on B.V. in front of the children and the example the children were taking from the abuse, we hold that the circuit court did not clearly err in adjudicating C.V., Z.G.B., and J.B. dependent-neglected.

Campbell's Evaluation and Testimony

Finally, appellant asserts that the circuit court erred in denying a continuance to allow for Mr. Campbell's testimony. She observes the portion of the psychological evaluation where he concluded that she was not a threat to the children and argues that the evaluation was relevant to whether the children were at risk of harm.

Appellant's point heading is inconsistent from the argument at trial and on appeal. To the extent that she is asserting error as a result of the circuit court's failure to grant a continuance, this argument is not preserved. Appellant never sought a continuance on this ground.⁶ Her failure to raise the issue before the circuit court precludes her from asserting it as an error on appeal. *See, e.g., Yarborough v. Ark. Dep't of Human Servs.*, 96 Ark. App. 247, 240 S.W.3d 626 (2006). However, to the extent that she is arguing that the circuit court erred in not considering the psychological evaluation during the adjudication proceeding, her argument is preserved for appellate review.

Nonetheless, we affirm on this point. Error may not be predicated upon an evidentiary ruling unless a substantial right is affected, and we do not reverse in the absence of prejudice. *See, e.g., Jackson v. Buchman*, 338 Ark. 467, 996 S.W.2d 30 (1999). We conclude that appellant's rights were not affected by the exclusion of this evidence. Appellant sought to introduce the psychological evaluation to show that she was not a threat to her children;

⁶Appellant sought a continuance on another ground. Specifically, she asked that the adjudication hearing be postponed until the criminal charges against her were resolved. The court denied that motion. Appellant is bound by the nature and scope of the argument she made before the circuit court. *See, e.g., Watson v. State*, 358 Ark. 212, 188 S.W.3d 921 (2004).

yet, there was ample evidence to establish that fact. The admission of the evaluation would have merely been cumulative to this evidence. *See Sparrow v. Ark. Dep't of Health & Human Servs.*, 101 Ark. 193, ___ S.W.3d ____ (2008) (stating that it is not erroneous to exclude evidence that is cumulative of other evidence). Accordingly, we hold that the exclusion of the psychological evaluation was harmless.

Affirmed.

PITTMAN and HART, JJ., agree.